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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EARL LEE DIXIE, Defendant and Appellant.	E060217 (Super.Ct.No. RIF121599) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Kevin Vienna and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Earl Dixie is serving 25 years to life as a third-striker after a jury convicted him of several charges resulting from his efforts to evade a vehicle stop by driving dangerously through a neighborhood. He appeals from the trial court's denial of his petition for recall under Penal Code[1] section 1170.126, also known as Proposition 36. For the reasons discussed below, we affirm the trial court's ruling.

FACTS AND PROCEDURE[2]

While patrolling at dusk on a Sunday evening, in an area known for drug trafficking and prostitution, uniformed police officers in a marked patrol car noticed expired registration tags on defendant's vehicle. The vehicle was stopped on the side of the road, and defendant was seen speaking to two women through the window. As the officers' patrol car approached defendant's vehicle, defendant drove away. The officers activated the red lights on the patrol car and began to follow defendant's vehicle. Defendant pulled into a nearby parking lot and stopped, but drove off at an accelerated speed when the officers exited their patrol car and began to walk toward him. The officers returned to their patrol car, turned on the siren, and began to pursue defendant.

During the pursuit, defendant drove his vehicle at speeds of up to 100 miles per hour through residential streets, ran stop signs and red traffic lights, crashed through a fence, and struck two trees. For a portion of the chase, defendant turned off his headlights, presumably to avoid detection, and drove his vehicle on the wrong side of the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] This section is taken largely from this court's opinion in Case no. E042472.

street and in a bike lane. Defendant came close to hitting cyclists. Defendant also drove his vehicle in an area near a park where there is generally foot traffic at that time of day. Multiple police units became involved in pursuing defendant, including assistance from the air.

When defendant's vehicle finally broke down and came to a stop, the officers called for medical assistance because defendant was injured. The officers searched defendant's vehicle and found an open bottle of gin. Fire personnel searched defendant's person and found a bag of marijuana in his pocket. The officers determined defendant's license had been revoked and confirmed his vehicle registration was expired.

At trial, the prosecution offered testimony by an officer who participated in the pursuit, paramedics who arrived at the scene immediately after the chase, and an expert witness concerning substances found in defendant's blood and to what degree these substances could have impaired defendant's driving. Defendant testified at trial in his own defense. He explained that extenuating circumstances and emotional pain from the sudden death of a close relative lead him to ingest alcohol and illegal drugs and to then drive under the influence. He claimed to have been free of drug and alcohol abuse for eight years prior to this incident. Defendant stated he did not know why he evaded police. However, he admitted he was "high" and "wasn't thinking right." Defendant not only acknowledged the dangerousness of his actions but stated he was sorry for his conduct. In addition, defendant admitted a number of prior offenses and testified he suffered from diabetes, asthma, hypertension, and paranoid schizophrenia.

On June 15, 2006, the jury found defendant guilty of evading pursuing police officers, a felony, in violation of Vehicle Code section 2800.2 (count 1); hit and run after causing property damage during a vehicle accident, a misdemeanor, in violation of Vehicle Code section 20002, subdivision (a) (count 2); driving under the influence of alcohol and drugs, a misdemeanor, in violation of Vehicle Code section 23152, subdivision (a) (count 3); and misdemeanor possession of marijuana while driving a vehicle in violation of Vehicle Code section 23222, subdivision (b) (count 4). Defendant pled guilty to driving a vehicle with a suspended driver's license, a misdemeanor, in violation of Vehicle Code section 14601.1, subdivision (a) (count 5).

Five prior conviction allegations were tried separately before the court. Two of these convictions were for robberies in 1990, and the third was for an attempted robbery in 1992. Based on evidence submitted by the prosecution, the trial court found those three prior conviction allegations true and qualified as strikes. (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd (c)(2)(A).) In the two remaining prior conviction allegations, the prosecution claimed defendant served prior prison terms for a petty theft offense in 1994, and for one of the robberies in 1990, within the meaning of section 667.5, subdivision (b). Although the record is somewhat ambiguous, it appears the court struck or dismissed these allegations because defendant subsequently remained free of prison

custody for more than five years, and found there was insufficient evidence to satisfy the timing element of section 667.5, subdivision (b).[3]

The trial court also considered, but denied, defendant's motion to dismiss one or more strikes. To support the denial, the trial court noted the serious nature of the evasion offense, defendant's extensive criminal history, and his poor performance on parole and probation.

The trial court sentenced defendant on January 29, 2007. For the evasion offense (count 1), the trial court sentenced defendant to an indeterminate term of 25 years to life. In addition, the trial court imposed concurrent terms of six months each on counts 2 and 3 (hit and run & driving under the influence), a concurrent term of 30 days on count 4 (possession of marijuana), and a concurrent term of 10 days on count 5 (driving on a suspended license). Noting the prior prison term allegations had previously been stricken for insufficient evidence, the trial court did not impose any one-year enhancements under section 667.5, subdivision (b).

Defendant appealed. This court affirmed the conviction and sentence in an opinion filed March 13, 2008. Defendant then filed a habeas corpus petition in federal court, claiming his sentence was cruel and unusual punishment. The district court denied relief, but the Ninth Circuit granted an appeal; the appeal is currently stayed to permit

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[3] Section 667.5, subdivision (b), provides for a one-year enhancement to the prison sentence for a new felony based on each prior separate prison term that the defendant served for any prior felony "provided that no additional term shall be imposed under this subdivision for any prison term . . . served prior to a period of five years in

[footnote continued on next page]

defendant to return to the California courts and file a motion for recall of sentence under Proposition 36.

On January 31, 2013, defendant filed his petition for recall of sentence. At the conclusion of the hearing on the petition, held on December 13, 2013, the trial court denied the petition because defendant posed an unreasonable risk of danger to the public. In doing so, the court cited the following factors from defendant's criminal history: the egregious facts of the 2006 evading police conviction and the fact that it "could have certainly resulted in the death of individuals"; defendant's long criminal history including more recent domestic violence and assault charges for which he received a 17-year term consecutive to his current 25-years-to-life term; during one of the 1990 robberies defendant stabbed someone with a screwdriver and bit another person while attempting to flee; during the 1992 attempted robbery defendant and his accomplices tricked the victims into stopping their vehicle, opened the door and threw one of the victims down on the ground while his accomplice rifled through the victim's pockets before passing law enforcement personnel intervened; defendant violated parole five or six times from 1990 to 1996; defendant was sent to CYA as a juvenile in 1985 after being involved in a robbery and had a "substantial juvenile history of various adjudications ranging from a felony receiving stolen property to theft charges, to a burglary felony"; and as an adult had "various misdemeanors including, but not limited to, theft offenses, vandalism,

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[footnote continued from previous page]
which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction."

exhibiting a weapon, and another domestic violence charge." The trial court took into account that defendant had already received a reprieve from a three strikes prison term that he received in 1994 in that, after *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, defendant was able to get his 25-years-to-life sentence for petty theft with a prior reduced to seven years. The court balanced these negative factors against defendant's age (46 on the date of the petition hearing) and his poor health including diabetes, hypertension, obesity, sleep apnea and hip pain, and that he at that time was using a wheelchair or cane to get around. Overall, the court weighed defendant's long-term history of violence and consistent pattern of criminal behavior and exercised its discretion to deny defendant's petition.

This appeal followed.

DISCUSSION

A. *Proposition 36—The Reform Act Generally*

The Reform Act amended sections 667 and 1170.12 and added section 1170.126; it changed the requirements for sentencing some third strike offenders. "Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The [Reform] Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citations.] The [Reform] Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the

three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168 (*Yearwood*).)

"Thus, there are two parts to the [Reform] Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony [citations]; the second part is *retrospective*, providing *similar, but not identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126)." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1292 (*Kaulick*), italics in original.) "The main difference between the prospective and the retrospective parts of the [Reform] Act is that the retrospective part of the [Reform] Act contains an 'escape valve' from resentencing for prisoners whose release poses a risk of danger." (*Id*. at p. 1293, fn. omitted.)

It is undisputed that defendant's current commitment felony offense of evading pursuing police officers pursuant to Vehicle Code section 2800.2 is not a serious or violent felony under Penal Code section 667.5, subdivision (c), or Penal Code section 1192.7, subdivision (c). However, the inquiry does not end with whether or not the current conviction is a serious or violent felony. As previously noted, if the petition satisfies the criteria contained in subdivision (e) of section 1170.126, the inmate shall be resentenced as a second strike offender "'unless the court, in its discretion, determines

that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' ([Pen. Code,] § 1170.126, subd. (f).) In exercising this discretion the trial court may consider the prisoner's criminal history, disciplinary record and record of rehabilitation while incarcerated and any other relevant evidence. ([Pen. Code,] § 1170.126, subd. (g).)" (*Yearwood, supra,* 213 Cal.App.4th at pp. 170-171.)

"In approving the Reform Act, the voters found and declared that its purpose was to prevent the early release of dangerous criminals and relieve prison overcrowding by allowing low-risk, nonviolent inmates serving life sentences for petty crimes, such as shoplifting and simple drug possession, to receive twice the normal sentence instead of a life sentence. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, subds. (3), (4) & (5), p. 105 . . . .)" (*People v. White* (2014) 223 Cal.App.4th 512, 522 (*White*) (review den. Apr. 30, 2014, S217030).) The electorate also mandated that "the Reform Act be liberally construed to effectuate the protection of the health, safety, and welfare of the people of California. (Voter Information Guide, *supra,* text of Prop. 36, § 7, p. 110.)" (*Id*. at p. 522.) Accordingly, we liberally construe the provisions of the Reform Act in order to effectuate its foregoing purposes; and note that findings in voter information guides may be used to illuminate ambiguous or uncertain provisions of an enactment. (See *White*, at p. 522; *Yearwood*, *supra*, 213 Cal.App.4th at pp.170-171.)

B. *Denial of Petition*

Defendant contends the trial court erred in finding that resentencing him posed an unreasonable risk of danger to public safety. Review of the trial court's ruling on the petition involves more than one issue. In part, we are called upon to determine the

meaning of section 1170.126, particularly the provision that states: "*the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety*." (§ 1170.126, subd. (f), italics added.) We independently determine issues of law, such as the interpretation and construction of statutory language. (*People v. Love* (2005) 132 Cal.App.4th 276, 284.) The principles of statutory interpretation apply to voter initiatives, as well as to enactments of the Legislature. (*Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 727.)

Beyond any issues of statutory interpretation, we are also called upon to review the trial court's discretionary ruling, finding that a new sentence would represent an unreasonable risk of danger to the public. "[S]ection 1170.126 entrusts the trial court with discretion that may be exercised to protect the public. A court may deny a section 1170.126 petition if, after examination of the prisoner's criminal history, disciplinary record while incarcerated and any other relevant evidence, it determines that the prisoner poses 'an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Yearwood*, *supra*, 213 Cal.App.4th at p. 176.)

"Where, as here, a discretionary power is statutorily vested in the trial court," we apply the abuse of discretion standard. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Reviewing courts often apply that standard to the review of discretionary postconviction decisions. (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at p. 531 [decision to dismiss or strike a prior conviction allegation under § 1385]; *People v. Carmony* (2004) 33 Cal.4th 367, 375 [refusal to dismiss or strike a prior conviction

allegation under § 1385]; *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974, 977 [decision whether to reduce a wobbler offense to a misdemeanor under § 17, subd. (b)].)

We conclude the abuse of discretion standard applies to the review of the trial court's section 1170.126 discretionary risk-of-danger finding. As such, we review the record to determine if the trial court abused its discretion in finding by a preponderance of the evidence that defendant "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f); *Kaulick, supra*, 215 Cal.App.4th at p. 1301.) When the standard of review is abuse of discretion, the reviewing court "examines the ruling of the trial court and asks whether it exceeds the bounds of reason or is arbitrary, whimsical or capricious. [Citations.] This standard involves abundant deference to the trial court's rulings." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018; see *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) Where the record shows the trial court balanced the relevant facts and reached an impartial decision in conformity with the law, we affirm. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 961.)

Here, the trial court exercised its discretion not to resentence defendant in the manner prescribed by section 1170.126. The court balanced the relevant factors and concluded defendant continued to pose an unreasonable risk of danger to public safety. We will not repeat the trial court's examination of defendant's criminal history as described *ante*, except to emphasize that the court carefully considered both the length of that history and the amount of violence that defendant inflicted on other people over that long period of time. In response to argument by defendant's trial counsel that most of

defendant's violent behavior had taken place when he was a young man, the court noted two facts that undermine that claim. First, defendant had most recently been in custody for the past 11 or 12 years and thus his opportunities for violent behavior had been severely curtailed. Second, the trial court noted that, prior to being incarcerated for the 2006 evading police incident, defendant was involved in a serious domestic violence and assault incident in which he hit one woman on the head with an empty alcohol bottle[4] and smashed a ceramic plant pot over the head of another woman, as well as swinging a metal pole at her.

The court also noted that defendant's disciplinary history while incarcerated was not serious, and included failing to comply with the directives of a correctional deputy and possession of drug paraphernalia. The court balanced this relatively calm period in defendant's life, his age and his health problems, against the risk he had posed to so many others while evading police during the commitment offense, and his long and consistent history of violence and poor performance on probation and parole. In reviewing this record, we cannot say that the trial court's determination that defendant remained an unreasonable risk to public safety was an arbitrary, whimsical, or capricious conclusion. (See, e.g., *People v. Nocelotl* (2012) 211 Cal.App.4th 1091, 1097.)

[4] The woman showed responding police that she was missing several teeth, about which she said, "This is what happened" after the last time she had spoken to police about a previous incident of abuse at defendant's hands.

C. *Application of Proposition 47*

In a supplemental brief, defendant argues that this court should apply the definition of the phrase "unreasonable risk of danger to public safety" as defined in section 1170.18, subdivision (c), to the phrase as it appears in section 1170.126, subdivision (f).[5] Defendant also argues that section 1170.18 applies retroactively and that under the definition of "unreasonable risk of danger to public safety" as defined in section 1170.18, subdivision (c), and as applied in section 1170.126, subdivision (f), resentencing defendant under section 1170.126 would not pose an unreasonable risk of danger to public safety. We find that Proposition 47 is not retroactive, and therefore we need not decide defendant's remaining contentions.

Proposition 47 created a new resentencing provision, section 1170.18, under which "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence" and request resentencing. (§ 1170.18, subd. (a).) Under that provision, an eligible defendant shall be resentenced to a misdemeanor "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Proposition 47 also provides that, "*As used throughout this Code*, 'unreasonable risk of danger to public

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[5] Section 1170.18 was enacted by the voters at the November 4, 2014, general election as part of the Safe Neighborhoods and Schools Act, otherwise known as and referred to herein as Proposition 47.

safety' means an *unreasonable risk that the petitioner will commit a new violent felony* within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (§ 1170.18, subd. (c), italics added.)

"No part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.) The California Supreme Court "ha[s] described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.'" (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) "In interpreting a voter initiative, we apply the same principles that govern our construction of a statute." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

Proposition 47 is silent as to its retroactive application to proceedings under the Reform Act. Similarly, the analysis of Proposition 47 by the legislative analyst, the arguments in favor of Proposition 47, and the arguments against Proposition 47 are silent as to the retroactive application to proceedings under the Reform Act. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47 & analysis by Legis. Analyst, pp. 34-39.) Thus, there is "no clear and unavoidable implication" of retroactivity that "arises from the relevant extrinsic sources." (*Brown*, *supra*, 54 Cal.4th at p. 320.) As noted earlier, this section and subdivision were enacted on November 4, 2014, when California voters passed Proposition 47, long past the time of defendant's resentencing hearing. Unless the legislation was designed or intended to apply

retroactively, the definition in section 1170.18, subdivision (c), cannot apply to defendant.

Nevertheless, defendant contends that the principle enunciated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) compels a finding of retroactivity here. As we explain, *Estrada* does not apply.

In *Estrada*, our Supreme Court stated: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) This includes "acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid*.) Accordingly, a statute lessening punishment is presumed to apply to all cases not yet reduced to final judgment on the statute's effective date, unless there is a "saving clause" providing for prospective application. (*Id*. at pp. 744-745, 747-748.)

Contrary to defendant's assertion, *Estrada* does not apply here because applying the definition of "unreasonable risk of danger to public safety" in Proposition 47 to petitions for resentencing under the Reform Act does not reduce punishment for a particular crime. Rather, it changes the lens through which the dangerousness determinations under the Reform Act are made. Using the words of *Brown*, that "does not represent a judgment about the needs of the criminal law with respect to a particular

criminal offense, and thus does not support an analogous inference of retroactive intent." (*Brown*, *supra*, 54 Cal.4th at p. 325.) As the California Supreme Court explained in *Brown*, "*Estrada* is . . . properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*Id.* at p. 324.)

Brown addressed the 2010 amendment to former section 4019 that increased the rate at which eligible prisoners could earn conduct credit for time spent in local custody. (*Brown*, *supra*, 54 Cal.4th at pp. 317-318.) In passing this amendment, the Legislature did not "express[ly] declar[e] that increased conduct credits [we]re to be awarded retroactively, and [there was] no clear and unavoidable implication to that effect . . . from the relevant extrinsic sources, i.e., the legislative history." (*Id*. at p. 320.) Thus, the California Supreme Court applied the "default rule" in section 3 that "'No part of [the Penal Code] is retroactive, unless expressly so declared.'" (*Brown*, at pp. 319-320.) In doing so, our Supreme Court rejected the defendant's argument that *Estrada* "should be understood to apply more broadly to any statute that reduces punishment in any manner, and that to increase credits is to reduce punishment." (*Brown*, at p. 325.) The court rejected the defendant's argument for two reasons: "First, the argument would expand the *Estrada* rule's scope of operation in precisely the manner we forbade . . . . Second, the argument does not in any event represent a logical extension of *Estrada*'s reasoning. We do not take issue with the proposition that a convicted prisoner who is released a day

early is punished a day less. But, as we have explained, the rule and logic of *Estrada* is specifically directed to a statute that represents '"a legislative mitigation of the penalty for a particular crime"' [citation] because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to '"satisfy a desire for vengeance"' [citation]. The same logic does not inform our understanding of a law that rewards good behavior in prison." (*Ibid.*, italics omitted, fn. omitted.)

Expanding the *Estrada* rule's scope of operation here to the definition of "unreasonable risk to public safety" in Proposition 47 in a petition for resentencing under the Reform Act would conflict with section 3's "default rule of prospective operation" (*Brown*, *supra*, 54 Cal.4th at p. 324) where there is no evidence in Proposition 47 that this definition was to apply retrospectively to petitions for resentencing under the Reform Act and would be improper given that the definition of "unreasonable risk to public safety" in Proposition 47 does not reduce punishment for a particular crime. For these reasons, we hold that the definition of "unreasonable risk to public safety" in Proposition 47 does not apply retroactively to a defendant such as the one here whose petition for resentencing under the Reform Act was decided before the effective date of Proposition 47.[6]

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[6] We note that the California Supreme Court granted review of *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676, which held that the definition of "unreasonable risk of danger to public safety" from Proposition 47 does not apply retroactively to petitions for recall and resentencing under the Reform Act. On this same date, the California Supreme Court also granted review of *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825, which held that the literal meaning of section 1170.18, subdivision (c), as added by Proposition 47 does not comport with the purpose of the Reform Act, and applying it to

[footnote continued on next page]

DISPOSITION

The order denying defendant's petition for a recall of his sentence under the Reform Act is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.

[footnote continued from previous page]
resentencing proceedings under the Reform Act would frustrate, rather than promote, that purpose and the intent of the electorate in enacting both initiative measures.